UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

IN THE MATTER OF: CARROLL & DUBIES SUPERFUND SITE Town of Deer Park, New York KOLMAR LABORATORIES, INC; WICKHEN PRODUCTS, INC., Settling Parties.	)	AGREEMENT FOR RECOVERY OF PAST RESPONSE COSTS Docket No. CERCLA - 02-99-2003 Proceeding Under Section 122(h)(1) of CERCLA, 42 U.S.C. §9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D. In EPA Region II, this authority has been redelegated to the Director of the Emergency and Remedial Response Division by order of the Regional Administrator dated October 29, 1998.

2. This Agreement is made and entered into by EPA and Kolmar Laboratories, Inc. ("Kolmar") and Wickhen Products, Inc. ("Wickhen")(hereinafter collectively referred to as "Settling Parties"). Each Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Carroll & Dubies Superfund Site ("Site") located in the Town of Deer Park, Orange County, New York. EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA has undertaken response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. Such actions have included, but are not limited to: various investigations of the Site; potentially responsible party searches; issuance of a Remedial Investigation/Feasibility Study ("RI/FS") Administrative Order on Consent (Index No. II-CERCLA-00202) to Kolmar and Wickhen; oversight of the first and second operable unit ("OU1 and OU2") and supplemental RI/FSs; preparation of the OU1 and OU2 Records of Decision

("RODs"); issuance of a Unilateral Administrative Order (Index No. II-CERCLA-95-0221) to Kolmar, Wickhen and Carroll & Dubies Sewage Disposal, Inc. and an amendment to that Order; issuance of a parallel Unilateral Administrative Order (Index No. II-CERCLA-97-0209) to the City of Port Jervis; oversight of the remedial design work performed to date; reevaluation of the OU1 remedial decision and issuance of an Explanation of Significant Differences.

5. In performing these response actions, EPA has incurred response costs at or in connection with the Site.

6. EPA continues to undertake response actions and incur costs in connection with this Site.

7. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and further alleges that they are jointly and severally liable for response costs incurred at or in connection with the Site.

8. EPA and Settling Parties desire to resolve Settling Parties' alleged civil liability for Past Response Costs without litigation and without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

9. This Agreement shall be binding upon EPA and upon Settling Parties and their successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period

shall run until the close of business of the next business day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

f. "Municipal Sewage Sludge" shall mean any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage, and may include residue removed, all or in part, during the treatment of wastewater from manufacturing or processing operations, provided that such residue has essentially the same characteristics as residue removed during the treatment of domestic sewage.

g. "Municipal Solid Waste" shall mean household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (e.g., yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills.

h. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

i. "Parties" shall mean EPA and the Settling Parties.

j. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through April 8, 1998 (March 14, 1998 for payroll and indirect costs), which have not been previously reimbursed, plus accrued Interest on all such costs through the date of payment pursuant to Paragraph 11 below.

k. "Section" shall mean a portion of this Agreement identified by a roman numeral.

l. "Settling Parties" shall mean Kolmar Laboratories, Inc. and Wickhen Products, Inc.

m. "Site" shall mean the Carroll & Dubies Superfund Site, located at the north end of Canal Street in the Town of Deer Park, Orange County, New York and depicted generally on the map attached as Figure 1. The Site includes the parcels where Carroll & Dubies Sewage Disposal, Inc. has conducted operations (including but not limited to waste disposal activities) and

all areas to which hazardous substances that have been released at or from those parcels have migrated.

n. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. REIMBURSEMENT OF RESPONSE COSTS

11. Within 30 days of the effective date of this Agreement, the Settling Parties shall pay to the EPA Hazardous Substance Superfund the sum of $650,000.00 (six hundred fifty thousand dollars), which payment shall constitute and be deemed full accord and satisfaction of any liability the Settling Parties might have under CERCLA for any and all Past Response Costs as defined and limited in paragraph 10.j. above.

12. Settling Parties shall make payment via electronic funds transfer ("EFT"). Payment shall be remitted via EFT to Mellon Bank, Pittsburgh, Pennsylvania, as follows:

To make payment via EFT, Settling Parties shall provide the following information to their bank:

- Amount of payment: **$650,000.00**
- Title of Mellon Bank account to receive the payment: **EPA**
- Account code for Mellon Bank account receiving the payment: **9108544**
- Mellon Bank ABA Routing Number: **043000261**
- Names of Settling Parties
- Case number: **CERCLA - 02-99-2003**
- Site/spill identifiers: **021Q**

Along with this information, Settling Parties shall instruct their bank to remit payment in the required amount via EFT to EPA's account with Mellon Bank.

13. At the time of payment, each Settling Party shall send notice that such payment has been made to the individuals listed in Paragraph 36, below and to:

Financial Management Officer
U.S. EPA, Region II
290 Broadway, 29th Floor
New York, NY 10007-1866

Said notice shall include the date of the EFT, payment amount, the name of the Site, the Docket Number of this Agreement and Settling Parties' names and addresses.

VI. FAILURE TO COMPLY WITH AGREEMENT

14. In the event that the payment required by Paragraph 11 is not made when due (which is within 30 days after the "Effective Date of this Agreement"), Interest shall accrue on the unpaid balance from the date due through the date of payment.

15. If the amount due to EPA under Paragraph 11 is not paid by the required date, Settling Parties shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, $1000.00 per violation per day that such payment is late.

16. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with Paragraphs 12 and 13.

17. Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment or performance is due, or the day a violation occurs, and shall continue to accrue through the date of payment or final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

18. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

19. The obligations of Settling Parties to pay amounts owed to the United States under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

20. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Parties' payment of stipulated penalties shall not excuse Settling Parties from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT NOT TO SUE BY EPA

21. Except as specifically provided in Paragraph 22 (Reservations of Rights by EPA),

EPA covenants not to sue Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Paragraph 11 and Paragraphs 14 (Interest on Late Payments) and 15 (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

22. The covenant not to sue by EPA set forth in Paragraph 21 does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all other matters, including but not limited to:

a. liability for failure of Settling Parties to meet a requirement of this Agreement;

b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

23. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTIES

24. Settling Parties agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

25. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

26. Settling Parties agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Parties with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if

a. any materials contributed by such person to the Site constituting Municipal Solid Waste (MSW) or Municipal Sewage Sludge (MSS) did not exceed 0.2% of the total volume of waste at the Site; and

b. any materials contributed by such person to the Site containing hazardous substances, but not constituting MSW or MSS, did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

27. Settling Parties agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person that has entered into a final CERCLA § 122(g) de minimis settlement with EPA with respect to the Site as of the effective date of this Agreement. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

28. Except as provided in Paragraph 26 (Waiver of Claims Against De Micromis

Parties) and Paragraph 27 (Waiver of Claims Against De Minimis Parties), nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. Except as provided in Paragraphs 26 and 27, EPA and Settling Parties each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

29. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

30. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for Past Response Costs.

31. Each Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

32. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Paragraph 21.

XI. RETENTION OF RECORDS

33. Until 10 years after the effective date of this Agreement, each Settling Party shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at or in connection with the Site or to the liability of any person for response costs or response actions conducted and to be conducted at or in connection with the Site, regardless of any corporate

retention policy to the contrary.

34. After the conclusion of the document retention period in the preceding Paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA, Settling Parties shall deliver any such records or documents to EPA. Settling Parties may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with the United States shall be withheld on the grounds that they are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records and documents that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor.

XII. CERTIFICATION

35. By signing this Agreement, each Settling Party certifies individually that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability or the filing of a suit against the Settling Party regarding the Site; and

c. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e), 9622(e).

XIII. NOTICES AND SUBMISSIONS

36. Whenever, under the terms of this Agreement, notice is required to be given or a

document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

As to EPA:

Maria Jon
Remedial Project Manager
Emergency and Remedial Response Division
U.S. EPA, Region II
290 Broadway, 20th Floor
New York, NY 10007-1866

and to:

Sharon E. Kivowitz
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Region II
290 Broadway, 17th Floor
New York, NY 10007-1866

As to Settling Parties:

Jonathan A. Murphy
Lester, Schwab, Katz & Dwyer
120 Broadway
New York, NY 10271-0071

and to:

Robert Glasser
Gould & Wilkie
One Chase Manhattan Plaza
58th Floor
New York, NY 10005

XIV. INTEGRATION/APPENDICES

37. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or

understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement: "Figure 1" is the map of the Site.

XV. PUBLIC COMMENT

38. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XVI. ATTORNEY GENERAL APPROVAL

39. This Agreement is subject to the approval of the Attorney General or her designee, pursuant to Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

XVII. EFFECTIVE DATE

40. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 38 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: _____
Richard L. Caspe, Director
Emergency and Remedial Response Division

8/26/1999
Date

Lenclosed 08/09/99

THE UNDERSIGNED SETTLING PARTY enters into this Agreement, Docket No. CERCLA-02-99-2003, relating to the Carroll & Dubies Superfund Site, Town of Deer Park, New York:

FOR SETTLING PARTY: Kolmar
[Name]

P.O Box 1111, King St. Port Jervis, N.Y.
[Address]

By: Ronald Valenzi 4/26/99
[Name] [Date]

THE UNDERSIGNED SETTLING PARTY enters into this Agreement, Docket No. CERCLA-02-99-2003, relating to the Carroll & Dubies Superfund Site, Town of Deer Park, New York:

FOR SETTLING PARTY: Wichhen Products, Inc.
[Name]
c/o Gould & Wilkie, One Chase Manhattan Plaza
[Address] New York, NY 10005

By: _____ May 17, 1999
[Name] [Date]